

REFINING JUDICIAL PROCEDURES FOR ENHANCED ACCOUNTABILITY

B.VISHNUCHELLIYA B.A.B.L., (HONS.); ML(Business law)

I. Introduction

The three organs of the Indian government – **Legislature, Executive** and **Judiciary** perform three essential functions of rulemaking, rule application and rule adjudication respectively. The main principle behind this formulation is **separation of powers**: which brings accountability, keeps the government restrained and in this way our rights and liberties are safeguarded. In fact the main driving force behind this is based on the simple saying that **‘power corrupts man and absolute power corrupts absolutely’**. In the words of Montesquieu, “Constant experience has shown us that every man invested with power is apt to abuse it, and to carry his authority until he is confronted with limits’.

In short absolute power without accountability leads to corruption. Corruption in India is always in limelight. In his foreword to the UN Convention Against Corruption, the then Secretary General of the United Nations, Mr. Kofi Annan wrote, “Corruption is an insidious plague that has a wide range of corrosive effects on society. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and it allows organized crime, terrorism and other threats to human security to flourish.” However recently what has caught our attention is the corruption charges levied against judges; examples being a Calcutta High Court Judge Soumitra Sen guilty of misappropriating large sums of money and making false statements regarding it and Chief Justice of Karnataka High Court P D Dinakaran, alleged for land grabbing and corruption. It is nevertheless to be noted that the word ‘recently’ should not mislead us to think that corruption in Judiciary is a new thing, it has always been there, only less talked about. But given the increase in the rate of corruption charges one can’t help but ask the question **‘who is judging the judges?’**

There is another principle working together with the separation or balance of power i.e., **checks and balances**. Simply put the theory of checks and balances holds that no organ should be given unchecked powers. The power of one organ should be checked and restrained by the other two, thus a balance is secured. After all **‘power alone can be the antidote to power’**. So we see in India how the executive is individually and collectively responsible to the legislature, although here the accountability has decreased because of anti-defection law,

whereby if there is any amount of dissent from the legislator, he is threatened with removal which can cost his constituency being unrepresented. Thus all decisions of party leaders are now just rubber-stamped by Parliament. checked by the judiciary, if it goes against the Constitution the latter declares it null and void. Moreover the legislature is accountable to the people who elect them for five years. Given this it becomes clear that the judiciary is the guardian of the Constitution and protector of fundamental rights. In spite of this there is a sudden spate of judiciary corruption which is proving to be self-defeating and is indicating towards the lack of accountability in the institution, this is what I will be discussing in my project. This is important because in the preamble we give to ourselves **JUSTICE- Social, Economic and Political.**

Any authority that has some amount of public power must be responsible to the people. The fact is that in a 'democratic republic', power with accountability of the individuals enjoying it, is essential to avert disaster for any democratic system. But before moving into the concept of accountability, what is important to note and understand is another concept i.e. '**independence**' of judiciary. Both these concepts have to be studied together to understand any one.

II. INDEPENDENCE OF THE JUDICIARY

Independence is a bulwark of **rule of law**. If law is to be applied equally to all citizens in the country, then it is equally important that the judges should be independent in applying law and rendering judicial decisions. Judges can be subject to threats and pressures from litigants, including society's criminal element. Independence of judiciary is a recognized principle adopted by most of the democratic countries. Mona Shukla has provided us with the history of judicial independence in **United Kingdom, United States and India.**

United Kingdom: The concept first began from here. There had been a long struggle between the parliament and monarchy to control judiciary. In the 17th century, the parliament passed a settlement act, which stipulated that the tenure of the judges would be subject to good behaviour and their removal after an address to both houses of parliament.

United States: Attempt for independence was seen in the 1985 *Basic Principles on the Independence of Judiciary* which states “the Judiciary shall decide matters before them... without any restrictions, improper influence, inducement, pressures, threats or interference, direct or indirect, from any quarter or for any reason”.

India: Before independence, judges were appointed by the Crown, yet they had independence from it. After independence, this principle was taken seriously and it became a part of the Basic Structure of the Constitution, which cannot be amended. The independence is guaranteed by the Constitution which holds that the judges of the Supreme Court and the High Court hold office till he attains 65 and 62 years of **age**. The parliament is authorized to prescribe the **privileges, allowance, leave and pension** of the judges of the SC. The Constitution prescribes for **high qualifications** for the judges. Further no judge can be removed from his office by the President except upon the presentation of him of an address by each house of the parliament for such **removal on the grounds of misbehaviour and incapacity**. A judge of the SC and HC is **appointed** by the President of India in consultation with the CJ of India and such judges of SC and HC as he may deem necessary. The SC is also treated as the **court of record**. However this independence has been misused by many and it has also been the reason for the growth of enormous power. The problem actually lies in the understanding of independence; it should be understood as independence from executive and legislature and not independence from accountability. The spirit of independence has been captured very aptly by Lord Woolf, “the independence of the Judiciary is not the property of the Judiciary, but a commodity to be held by the Judiciary in trust for the public.”

III. JUDICIAL ACCOUNTABILITY

Judicial accountability is in fact a corollary of the independence of the judiciary. Simply put, accountability refers to taking responsibilities for your actions and decisions. It generally means being responsible to any external body; some may insist accountability to principles or to oneself rather than to any authority with the power of punishment or correction. Since accountability is a facet of independence the Constitution has provided in **Article 235**, for the ‘control’ of

the High Court over the Subordinate Judiciary clearly indicating the provision of an effective mechanism to enforce accountability. Thus entrustment of power over subordinate judiciary to the High Court preserves independence as it is neither accountable to the executive or the legislature. The provision of the difficult process of impeachment has also been directed towards this goal. The absence of any mechanism for the higher judiciary except for extreme cases is because the framers of the Constitution had thought that **'settled norms'** and **'peer pressure'** would act as adequate checks. However it hasn't happened completely in that manner. The main problem is that the judiciary is neither democratically accountable to the people nor to the other two organs.

The Supreme Court had rightly asserted that "A single dishonest judge not only dishonours himself and disgraces his office but jeopardizes the integrity of the entire judicial system." This brings us the section on **why do we need accountability**. A campaign issued by the people's convention on Judicial Accountability and Reforms had mentioned, "The judicial system of the country far from being an instrument for protecting the rights of the weak and the oppressed has become an instrument of harassment of the common people of the country.... The system remains dysfunctional for the weak and the poor... (and has been) displaying their elitist bias."

Mona Shukla has listed down **three promotions** done by Judicial Accountability:

1. It promotes the **rule of law** by deterring conduct that might compromise judicial independence, integrity and impartiality.
2. It promotes **public confidence** in judges and judiciary.
3. It promotes **institutional responsibility** by rendering the judiciary responsive to the needs of the public it serves as a separate branch of the government.

Transparency is facilitated through the process of accountability. It is best achieved when one is accountable to law. The existing systems of accountability have failed, and the growing corruption is eating away the vitals of this branch of democracy. This lack of accountability has been best put forward by Pt. Nehru in a diatribe, "judges of the Supreme Court sit on ivory towers far removed from

ordinary men and know nothing about them.” The demi god’s image has to be replaced, after all judges are also humans capable of making mistakes and committing vices. But what has gone wrong? The problem in making the judiciary accountable is discussed below which will help us in understanding the issue and later find solutions to achieve it.

IV. PROBLEMS IN REGARD TO MAKING JUDICIARY ACCOUNTABLE:

There are several reasons that have been identified for the failure of accountability:

1. Impeachment: The only available mechanism is too impractical.

According to the Indian Constitution, the only way through which the members of the higher judiciary that is the Chief Justices and Judges of Supreme Court (SC) and High Courts (HC) are accountable or can be removed is through impeachment. Many regard impeachment as a failure, but before moving into that it is important to see the constitutional provisions. Under **Article 124(4)**, the process of impeachment is carried out only on the grounds of proven misbehaviour or incapacity. The Judges Inquiry Act, 1968 states that a complaint against a judge is to be made through a resolution signed either by 100 members of the Lok Sabha or 50 members of the Rajya Sabha to their respective presiding officers. There is a three member committee comprising two judges one from SC and the other Chief Justice of India if it is against a HC judge; and two SC judges if it is against a sitting judge at the apex court. Investigations are carried out before making a recommendation to the house. If the committee has concluded for the impeachment process to take place, the matter is discussed in both houses. The alleged judge is also given opportunity to rebut the charges. After the debate is done and the judge is heard, the house decides to put the motion to vote, a resolution passed by 2/3rds majority in both houses. This whole process has to be completed in a single session. After the resolution is passed, it is sent to the president who then orders for removal.

Given this provision, the story ends with no one being judge has been impeached till date. However it will be a misjudgment if one thinks that the judiciary is free from corruption. The loophole is the entire process of impeachment itself. It is

undoubtedly lengthy and cumbersome. Many have even regarded this as a complete failure.

Reasons:

To begin an impeachment one needs signatures to pass the resolutions. However, that becomes quite an impossible task since many MPs have their own pending individual or party cases in these judges court, so they are not willing to risk themselves. Conclusive documentary evidences are also required before they put their signatures to the motion. In one of his interviews, Prashant Bhushan cites an example where in an impeachment proceeding against Justice Bhalla, the BJP declined to sign because L.K. Advani had been acquitted by him in the *Babri Masjid* demolition case. One can also not forget the Justice Ramaswamy case, who had been charged with misusing of courts fund, yet the Congress (I) refused to cast their vote. Few points that definitely proves his misbehavior.

1. "That he is misappropriated some of the furniture, carpets, and some other items purchased from the court's funds for his official residence costing more than Rs 1,50,000 and did not account for the same at all.
2. "That he misused public funds to the extent of Rs 9.10 lac by making the court pay for non-official calls made on his residential telephones at Chandigarh during his 22 months in office as a Chief Justice of Punjab and Haryana High Court.
3. "That he gave unjustified promotions to several members of subordinate staff of the HC whom he misused for aiding and abetting his acts done for his personal gain."

He was the first judge to face impeachment proceeding but it failed even though there were conclusive evidences against him.

- The Investigating Committee comprising the judges themselves doesn't seem the correct mechanism. It has often been said that the judges act together like a 'trade union', so they generally wouldn't like to charge their fellow colleagues of corruption. A solution to this can be the National Judicial Commission, an independent institution. Such a commission will have their own investigating

machinery. Thus it will also not harm the independence since the judiciary is not accountable to either the executive or legislature.

- I do agree with the special 2/3rd majority. This will maintain the independence and also adds the seriousness to the issue. It is important to understand that at the end of the day judiciary is an important organ with huge responsibilities. An organ with extraordinary functions demands to be treated differently. A simple majority on the other hand can prove to be detrimental to independence.

2. The Veeraswamy case:

The additional immunity with which the judges have cloaked themselves was in the Justice *R. Veeraswamy* case, in which it was declared that judges of SC or HC cannot be subjected to investigation in any criminal offence of corruption, or a FIR be registered against them without the prior permission of the CJI. Again it's not likely that the CJI will allow such permission, as it can bring shame to the entire Judiciary.

3. Contempt of Court:

The contempt of court can be seen as a means to protect the independence of the court, however it is mostly seen that the court has used this as a means of shielding themselves from any criticism. Contempt is defined as any act that is offensive and critical to the dignity and the authority of courts. According to Oswald, "contempt of court is so manifold in its aspect that it is difficult to lay down the exact definition of the offence." Contempt can be classified into two groups:

- **Civil:** means wilful disobedience of any, judgment, decree, direction, order or any other processes of court.

- **Criminal:** means publication of any matter or the doing of any other act whatsoever which scandalizes or tends to lower the authority of any court.

It has often been referred that contempt of court for much part is a hangover from the British rule. During the British rule, India was not free and democratic, but today the situation has changed. Questions therefore arise as to how can laws of those days be applicable today. There is also problem with the definition, as there is no definition as to what constitutes scandalizing the court as what was regarded scandalous earlier may not be regarded today. The Contempt of Court Act 1952 has also been criticized on the basis that it infringes two important fundamental rights of the citizen, namely, the right to personal liberty and the right to freedom of expression. Given this allegation one is reminded of two important cases that took place:

- **Arundhati Roy case:** the problem arose as a result of the decision of the SC, which ordered the concerned state governments to raise the height of the Sardar Sarovar Dam up to 90 ft. This came as a great disappointment to the *Narmada Bachao Andolan* as it would lead to more submergence of the nearby villages. This was severely criticized and a notice of contempt was served against Arundhati Roy, Medha Patkar and advocate Prashant Bhushan. The three however asserted that they were exercising their freedom enshrined in the Constitution. The court held Arundhati Roy guilty and sentenced her to one day imprisonment and a fine of Rs. 2000. What was shocking and rather patriarchal was condescendingly referring her as a “woman” whom they had treated leniently by giving her one day punishment.

- **Mid-Day journalists** had published documentary evidences against Justice Sabharwal, who passed the orders of sealing commercial properties in residential areas in Delhi, after his sons had got partnership with leading shopping malls. These orders stood for their benefits. Yet no action was taken against him. It was only after the convictions of four Mid-Day journalists for contempt, by Delhi HC, that the news got coverage in the mainstream media²⁹. This shows a fear in the media which has deterred them from investigation against corruption in judiciary. The fact is that this power is like a Damocles’ sword which hangs over the neck of the people, particularly the media.

IV. SOLUTIONS

1. RESTATEMENT OF VALUES OF JUDICIAL LIFE: CODE OF CONDUCT.

The conference of Chief Justices of all HCs was held on 3rd and 4th December, 1999, where all the Chief Justices unanimously resolved to adopt the “Restatement of Values of Judicial Life”. This would serve as a guide to be observed by the judges, essentially for an independent, strong and respected judiciary in the impartial administration of justice. Some of codes that must be followed are –

- Judges should not conduct election to any office of club, society or other associations
- A judge should not hear and decide a matter in which a member of his family, a close relation or a friend is concerned.
- A judge should not speculate in shares, stocks or the like.

2. The NATIONAL JUDICIAL COMMISSION (NJC):

Growing dissatisfaction with the failure of in-house mechanism, it has been rightly felt that an independent mechanism like the NJC would help in achieving the much needed accountability. The suggestion for a NJC has been made by the 80th Report of the Law Commission of India and the 121st report of the Law Commission of India. This body will consist of five members:-

- (i) One member nominated by a collegium of all the judges of Supreme Court.
- (ii) One member nominated by collegiums of all Chief Justices of High Court
- (iii) One member nominated by the cabinet
- (iv) One member nominated by a collegium of the Speaker, Leader of the Opposition in the Lok Sabha and the leader of Opposition in the Rajya Sabha
- (v) One member nominated by a collegium of Chief Vigilance Commissioner of the Central Vigilance Commission (CVC), Comptroller and Auditor General (CAG) and the Chairperson of the National Human Rights Commission (NHRC).

(vi) They will work as full time members. They will have investigating machinery, where charges against judges will get investigated. According to the committee on judicial accountability, this commission will also select judges for appointment to HC and SC, which will be notified for public information. Thus in this way independence is maintained as they are not accountable to the Parliament or the Government.

3. JUDICIAL STANDARD AND ACCOUNTABILITY BILL:

This will replace the previous Judges Inquiry Act. It will be headed by a former Chief Justice of India, where the public can lodge complaints against erring judges, including the Chief Justice of India and the Chief Justices of the High Courts. The five-member committee will be appointed by the President. Here the President is bound to accept PM's recommendation. Now if this recommendation is done by a three member committee two from government and one recommended by the leader of the opposition, then the minority dissent will also be addressed. On receiving a complaint, the committee will forward it to a system of scrutiny panels, which will have the powers of a civil court. If the charges are serious, the committee can request the judge concerned to resign. If the judge does not do so, the oversight committee will forward the case to the President with an advisory for his removal. The bill mandates that the judges should not have any close association with the individual members of the bar. All the details concerning the investigations will be put up in the SC and HC websites.

V. CONCLUSION:

The fact that independence may need some interference shows that there are other ideals i.e. unbiased and fair trials, more important than the former and these ideals can be achieved only through an accountable judiciary. Independence should be used only as a means to achieve this end and not an end in itself. If accountability is not taken seriously we can witness a dangerous nexus between corrupt judges and politicians which will bring an end of democracy. It is also important to keep in mind that accountability in judiciary

is different from the other two organs, the distinctive nature of the office demands separate treatment and this is in view of the nation's benefit.

The main task of judiciary is to dispense speedy justice and bring relief to the litigant. It is through this way that public trust can be maintained. As the saying goes 'let justice be done, even though heaven fall'. However it is not that the judiciary has completely failed; Lok Adalats and Nyaya Panchayats have definitely helped the people in having an equal and fair justice. A judge can ultimately be deemed accountable if she/he adheres to the normative and ethical principles of her society and culture.

It was once said by the former President K.R. Narayan that, "It is not an exaggeration to say that the degree of respect and public confidence enjoyed by the SC is not matched by any other institution in the country." This trust can be maintained only when the judiciary is constantly subjected to people's 'ombudsmanning'. It has to accept that criticism is a way of reinforcing accountability and therefore it must be tolerant. The best judicial reform would be the one where judiciary functions according to the philosophy of the Constitution. An organized public opinion and campaign is required to bring about greater accountability.

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